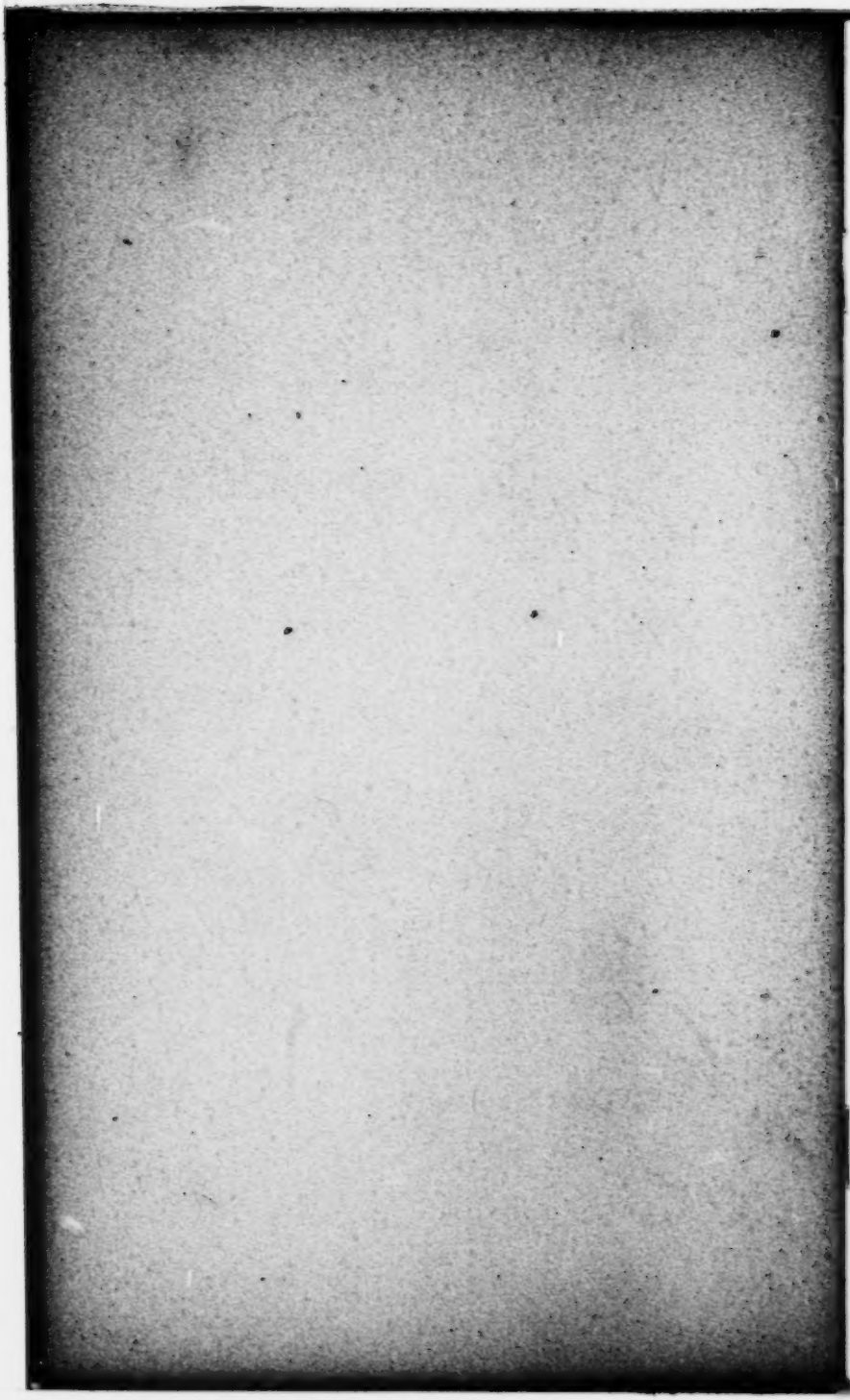

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.,
Petitioner,

vs.

NATIONAL BANKAMERICARD INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief in Opposition

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QUESTION PRESENTED

Respondent, National BankAmericard Incorporated (NBI), produces a national bank card under the familiar logo "BankAmericard." Its only national bank card competition is provided by Interbank Card Association (Master Charge), which uses the equally familiar logo "Master Charge." Section 2.16 of NBI's bylaws provide that none of its approximately 240 banks which are the owners of NBI can also become part of the competing Master Charge system. Petitioner, Worthen Bank and Trust Company, one of the owners of NBI, joined Master Charge and sued to enjoin the enforcement of the NBI bylaw pro-

hibiting dual membership. After preliminary and incomplete pretrial discovery, Worthen moved for summary judgment on the ground that the NBI bylaw was a per se violation of the Sherman Act. The facts upon which Worthen based this contention were in conflict. The district court nonetheless granted summary judgment, found upon conflicting facts that the bylaw constituted a "group boycott" and, on this basis, held it per se invalid. The court of appeals held that summary judgment was inappropriate and reversed for trial.[1]

The question presented is whether the court below correctly reversed a summary judgment based on facts which are in conflict.

STATEMENT OF THE CASE

NBI is a for-profit nonstock membership corporation comprised of commercial banks. NBI and its members jointly produce a multipurpose national bank card system under the name "BankAmericard." NBI's principal competitor is the Master Charge national bank card system, the only other multipurpose national bank card system, and the larger of the two.[2]

In October, 1971, NBI adopted section 2.16 of its bylaws. In substance, section 2.16 prohibits owner-members of one

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1. In so ruling, the court of appeals concurred in the views expressed in an *amicus* brief filed by the Department of Justice. This brief was requested by the court, on its own motion, because "After oral argument of this case it became apparent that any decision in this case would affect the bank credit card industry generally • • • [and] the importance of the bank credit card industry to the general public was undisputed • • •" (Appx. to Pet., p. A-2—A-3, fn. 2).

A copy of the *amicus* brief of the Department of Justice has been lodged with the Clerk of this Court.

In the instant brief, "Appx. to Pet." refers to the appendix to the petition for a writ of certiorari. "Appx." refers to the printed appendix filed in the court below.

2. The facts set forth herein are supported by the affidavits of the following persons, filed by NBI in opposition to the Motion for

bank card system from becoming a member of another bank card system (Aff.Hock, par 17, Appx., pp. 84-85).[3]

There are two classes of membership in NBI, Class A and Class B. Class A banks are the proprietary members in the national BankAmericard system. They control and finance the system, and serve on its board of directors. They have the sole right to issue cards, bill and extend credit to cardholders, process and exchange merchants' paper, provide authorization service and perform all other functions associated with and necessary to maintain, improve and service the national bank card system. All Class A members have access to NBI's confidential competitive innovations (Aff. Hock, pars. 3-4, 9, Appx., pp. 70-71, 73).

Class B banks do not issue cards or participate in management. They act only as agents for Class A banks. More than 90 per cent of the banks involved in the national bank card system fit into this category.[4] The agent bank status permits smaller banks to offer credit card services to merchant customers by accepting their sales drafts as agents of the card-issuing members, and to their depositors by requesting their sponsoring Class A bank to issue cards to them. Section 2.16, NBI's challenged bylaw, prohibits only

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Summary Judgment: Dee W. Hock, President and Chief Executive Officer of NBI ("Aff.Hock," Appx., pp. 69-95); Samuel B. Stewart, Chairman of the Board of Directors of NBI ("Aff. Stewart," Appx., pp. 101-106); Jack Elmer, Executive Vice President of Wells Fargo Bank, a member of the Master Charge system and one of the founders of that system ("Aff.Elmer," Appx., pp. 96-100); W. T. Gwennap, Vice President of Pittsburgh National Bank ("Aff.Gwennap," Appx., pp. 109-112); Weyman W. Horadam, Senior Vice President of the Bank of the Southwest, Houston, Texas ("Aff.Horadam," Appx., pp. 107-108).

3. Section 2.16 of NBI's bylaws is quoted in the opinion of the court below (Appx. to Pet., pp. A-6—A-8).

4. At the time the record was established herein, NBI had approximately 250 Class A members, and approximately 3,750 Class B members (Aff.Hock, par. 3, Appx., p. 70).

Class A proprietary banks from belonging to both competing systems (Aff.Stewart, par. 10, Appx., p. 104).

The national bank card system has but recently been developed and has received almost instantaneous wide public acceptance. The industry had its birth in 1966. Less than five years later, by the end of 1971, there were approximately 9,500 banks participating in the two national bank card systems, with more than 48,000,000 cards outstanding and with some 17,000,000 active accounts producing a dollar volume exceeding eight billion dollars—approximately $3,370,000,000 by BankAmericard and $5,000,000,000 by its competitor Master Charge, and over 1,000,000 merchant locations accepting those cards (Aff.Hock, pars. 3, 13, Appx., pp. 70, 81, 82).

The BankAmericard system competes with a number of nonbank card systems. It competes with the so-called T & E (travel and entertainment) cards, i.e., American Express, Carte Blanche and Diners' Club. It competes with local bank cards, and travelers checks. It competes with merchant credit cards such as oil company and airline credit cards, Sears Roebuck, and the like. None of these, however, competes at the level of a nationwide general purpose bank card system. The Master Charge card system is the only other such system (Aff.Stewart, par. 3, Appx., pp. 101-102; Aff.Elmer, par. 7, Appx., p. 98).

A national bank card system requires, among other things: (1) card-issuing banks throughout the country jointly bound together by uniform regulations, issuing readily identifiable cards for use with standard imprinters, sales drafts and merchant and bank terminals. Each card-issuing bank establishes on behalf of all the other associated card-issuing banks a contractual relationship with its cardholders for the extension of nationwide credit (Aff. Hock, par. 10, Appx., pp. 74-75); (2) contracts by the member bank or its agents with merchants whereby the

merchant agrees to honor the cards of the system without regard to whether the card is issued by the particular bank which signed the merchant, and under which the bank gives the merchant immediate credit for all authorized purchases on any card issued by any member bank (Aff.Hock, pars. 10(a), 10(b), 11(a), Appx., pp. 74-78; (3) a system of "interchange," under which the merchant's bank can be reimbursed by the card-issuing bank and the latter can bill its cardholder (Aff.Hock, par. 11(a), Appx., pp. 75-78); (4) a system of "authorization" for enforcing credit limits and preventing fraud and credit losses. On the occasion of each purchase in excess of a "floor limit" the merchant must verify the validity of the card and the credit of the cardholder with his own bank, which, in turn, must obtain authorization from the card-issuing bank before the purchase can be completed (Aff.Hock, pars. 11(b), 11(c), 14, Appx., pp. 78-79, 82-83).[5]

All of the foregoing functions are established and regulated in the bylaws and operating regulations of NBI, and operate through systems developed and owned by NBI and its Class A members, which unite the card-issuing banks in that system into a single unitary organization producing the national bank card and its accompanying services (Aff.Hock, pars. 7-11, Appx., pp. 71-81). Both the BankAmericard and Master Charge systems function only through the coordination by their member banks, operating under rules governing interchange, authorization, credit limits, collection, service, antifraud procedures, etc. A national bank card and the attendant services which give it value are not and cannot be produced by a single

5. The rapidity and accuracy with which transactions can be authorized is of key importance to the success of a national bank card system. A successful authorization program requires sophisticated communication and information feedback networks between member banks throughout the country (Appx. to Pet., p. A-5).

bank. Joint action of all card-issuing banks, operating as a unitary business entity, is required to produce the product (Aff.Hock, pars. 6, 10, 11, Appx., pp. 71, 74-81; Aff. Elmer, par. 18, Appx., p. 100).[6]

In producing a national bank card service, the two national bank card systems compete "for better and more efficient systems; to expand the services provided by the card; for better accounting and statistical reports and evaluations; in advertising and promotion; for operating and technological innovations, including research, analysis and the development of computer systems; for better communications, authorization, interchange, security, credit and collection procedures, cost accounting, statistical analysis, forecasting, budgeting, and other improvements" (Appx., p. 130). These areas of competition involve price equivalent factors used by both systems in seeking merchant participants and cardholders, and affect the cost of the systems with "direct impact upon interest charges and discount rates" (Aff.Elmer, par. 6, Appx., p. 103).[7]

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6. Worthen's own experience illustrates the difference between a local bank card (which can be produced by one bank acting alone) and a national bank card (which must be produced by a joint venture of nationwide banks). From 1959 through 1967, Worthen issued its own local bank card. In those eight years Worthen obtained 14,232 cardholders. In 1968, it became a member of the BankAmericard national bank card system. Its cardholder contracts immediately increased to 111,062 (Pl. Ans. to Interrog. No. 15). The largest percentage of Worthen's bank card business now requires interchange with other NBI banks (Appx., pp. 77-78).

7. The importance of preserving competition between the two systems in the field of research and technological innovations is pointed out in the opinion of the court below (Appx. to Pet., p. A-5).

> "Both systems are actively engaged in improving authorization capabilities by increasing computer utilization.
>
> "Thus:
>
> > 'NBI is presently developing a computerized national authorization system. . . . NBI's initial intent is to develop a nationwide communications system controlled

If member-banks were permitted to be proprietary members of both systems, there would be no incentive to maintain two separate systems. Such interlocking membership would be a merger *pro tanto* of the systems and would lead to the merger nationwide of the two competing systems into a single national bank card system (Aff.Hock, pars. 16, 18, 19, Appx., pp. 84, 85-86; Aff.Stewart, pars. 7, 8, 9, Appx., pp. 103-104; Aff.Elmer, par. 13, Appx., p. 99). With one system only, there could be no threat by merchant or customer when aggrieved by one system to channel the majority of its business to the other, and no incentive for one system to invent new methods, procedures and equipment for the improvement of its system, vis-a-vis the other (ibid.).

The foregoing facts were established by affidavits filed by NBI in response to the motion for summary judgment. In addition, Worthen made the following stipulations for the purpose of the district court's ruling on the motion for summary judgment (Appx. to Pet., pp. A-9—A-10):

"a. NBI acted in complete good faith and for legitimate business reasons, including the desire to preserve and foster competition between the two national credit card systems, when it passed by-law 2.16.

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by a central computer and several regional computers, which can be connected to electronically or optically engineered terminals in merchant or branch locations, capable of reading magnetically or optically encoded cards and providing virtually instantaneous communications for authorizations . . . .' App. 82-83.

"MC [Master Charge]:
'recently formed a subsidiary called International Communication Systems, Inc., ... It is working on providing computer links so that computers in one city can interface with each other and directly authorize cardholder transactions. [MC] is constantly reviewing and trying to improve its interchange system, including its charge-back and clearing procedures.' App. 99."

"b. Bylaw 2.16 serves the legitimate business purposes of NBI and promotes competition between NBI and other national credit card systems.

"c. In spite of bylaw 2.16 there will be vigorous competition in the bank card business.

"d. Without bylaw 2.16 there will be a substantial lessening of competition between the two national systems and an eventual merger of the two systems.

"e. Worthen's real interest in challenging the bylaw was to acquire a monopoly in the bank card industry in Little Rock, Pulaski County, and Arkansas.

"f. NBI's card cannot be produced by any single bank, and the production of the card requires the joint efforts of all banks within the system."

REASONS FOR DENYING THE WRIT

In order to classify NBI's bylaws as a "group boycott," two elements must be established, (1) a group of businessmen who are horizontal competitors, and (2) a collective refusal by them to deal.

The district court based its decision on the assumption of fact that each of the owner-members of NBI is able to produce a national bank card and that each bank competes with other banks in the production of the card (Appx. to Pet., p. A-43). Its conclusion followed, that a concerted refusal to deal by these competitors was a group boycott.[8] Its holding

8. This approach of the court led it to conclude that "The nature of NBI and the nature of Sealy are almost identical" (Appx. to Pet., p. A-43). But in *Sealy* (*United States v. Sealy, Inc.* (1967) 388 U.S. 350), each manufacturer produced a complete mattress, merchantable as such. Neither Worthen nor any other single member of NBI is capable of producing a national bank card. This was stipulated by Worthen in the court below (Appx. to Pet., p. A-10).

disregards the key fact established by NBI's affidavits, viz., that NBI is not a combination of separate entities competing with each other in the production of completed products, but a unitary enterprise jointly producing a single product. The very nature of the nationwide bank card service *requires* that banks, otherwise competing, engage in joint activities in respect of the bank card service in order to make that service available at all.[9]

Collective activity *necessary* for the production of a service has long been recognized as permissible under the antitrust laws.[10] Joint activity under such circumstances being lawful, it also follows, quite apart from the antitrust laws, that a joint venturer may not violate its fiduciary obligations by dividing its loyalties with a competitor and serv-

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9. The cooperative activity of the member banks in the production of the service is, by necessity, a constantly continuing one. As each purchase is in progress (unless the transaction is below the floor limit) the validity of the card and the credit of the customer must be checked by the merchant with his bank, and by that bank in turn with the card-issuing bank, and provisions must be in effect for reimbursement of the merchant bank by the card-issuing bank. The magnitude of this joint and continuing enterprise is shown by the fact that at the time of the hearing in the district court nearly half a million transactions a day involved interchange between the member banks throughout the country (Aff.Hock, par. 11(a), Appx., p. 74).

10. *Associated Press v. United States* (1945) 326 U.S. 1; *United States v. St. Louis Terminal* (1912) 224 U.S. 383; *Appalachian Coals, Inc., v. U.S.* (1933) 288 U.S. 344; *Chicago Board of Trade v. United States* (1918) 246 U.S. 231.

Cases such as *United States v. General Motors* (1966) 384 U.S. 127; *Klor's v. Broadway-Hale Stores* (1959) 359 U.S. 207; *Fashion Guild v. Trade Comm'n.* (1941) 312 U.S. 457, relied upon by Worthen, are beside the point. None involved collective action which was lawful because it was necessary to the production of a service.

ing as a conduit to that competitor of its joint venture's innovations and trade secrets.[11]

Worthen continues to argue its case on the basis of facts which were in conflict in the district court or which are contrary to its own stipulations.[12] It persists in its assumption

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11. As the court below pointed out (Appx. to Pet., p. A-20):
"There is some indication that dual representation of both NBI and MC [Master Charge] would result in the pirating of technological information relating to instantaneous computer verification of credit cards but there is no showing exactly how this might affect NBI and MC or its members."

Section 2.16 of NBI's bylaws, rather than being a "group boycott," simply enforces fiduciary obligations. From the standpoint of the antitrust laws it implements the policy underlying section 8 of the Clayton Act (15 U.S.C. § 19) which forbids interlocking directorates.

12. For examples:
At page 8 of its petition Worthen states as to NBI's intent:
"Worthen moved for partial summary judgment after engaging in enough discovery to be able to demonstrate without contradiction that the bylaw was intended, among other things, to deprive Class A members of NBI of the competitive advantage which they would otherwise have had by participating in the Master Charge program • • •."

In direct contrast, Worthen stipulated:
"NBI acted in complete good faith and for legitimate business reasons, including the desire to preserve and foster competition between the two national credit card systems, when it passed bylaw 2.16" (Appx. to Pet., p. A-9).

"Worthen's real interest in challenging the bylaw was to acquire a monopoly in the bank card industry in Little Rock, Pulaski County, and Arkansas" (Appx. to Pet., p. A-10).

Again, at pages 10 and 12 of its petition, Worthen states:
"The court below did not question that the challenged NBI bylaw prohibiting dual membership in national credit card systems was the product of the concerted and horizontal effort of competing economic entities • • •" (Pet., p. 10) and "The decision below simply stands for the proposition that businessmen • • • may • • • engage in concerted refusals to deal • • •" (Pet., p. 12).

Again, in direct contrast, Worthen stipulated:
"NBI's card cannot be produced by any single bank, and the production of the card requires the joint efforts of all banks within the system" (Appx. to Pet., p. A-10).

that NBI is a combination of competitors rather than a unitary enterprise. This assumption is contrary to the facts set out in NBI's affidavits which, for the purposes of summary judgment, must be accepted as true.

Worthen asserts that the decision of the court below conflicts with decisions of this Court "in suggesting that group boycotts * * * may be reasonable" (Pet., p. 14) if they have "'*any* redeeming value'" (Pet., p. 12), and in holding that the rule of reason must be applied to group boycotts in any new industry (Pet., p. 20). But this ignores the basis of the decision of the court below, viz., that a trial is necessary to resolve conflicting facts with respect to the nature of competition in the national bank card industry. The court below does not call into question any holdings by this Court which proscribe group boycotts, nor does it question that per se conduct is proscribed notwithstanding the possibility of some virtue in the conduct or the newness of an industry. What must be tried under the decision of the court below is whether, once all the facts have been disclosed, a "group boycott" exists.

This issue of fact cannot be resolved by conjuring with labels. As Judge Medina said in *United States v. Morgan* (S.D.N.Y. 1953) 118 F.Supp. 621, 690 (in holding that investment bankers did not violate the antitrust laws when they joined to underwrite a new issue of securities):

> "It matters not whether the members of the team be called 'partners,' 'quasi-partners,' 'joint adventurers' or what not; the significant fact vis-a-vis the Sherman Act is that they are acting together in a single, integrated, unitary, cooperative enterprise, the purpose of which is not 'raising, fixing, pegging, or stabilizing the price' of anything, nor the exercise of any manner of control over general market prices, but solely the distribution of a new security issue in an orderly manner."

And the court added (118 F.Supp. 689):

> "Those who participate as underwriters or dealers are in no sense competitors. When we speak of competitors nothing but confusion will follow unless we first determine what is the 'it' for which the competitors are supposed to be competing. Perhaps a few months before the [new stock] issue under discussion some of the participants were engaged in the underwriting and distribution of a quite different issue of securities, and others of another. But that can have nothing to do with the issue we are talking about. If, as is certainly the case, these participants and dealers are banded together in the enterprise of underwriting and distributing a particular issue, then by very definition they cannot be competitors."

In sum, there is no basis for Worthen's contention that *Topco*,[13] and other group boycott cases, make a determination of facts in the NBI case unnecessary. There is no basis for applying a rule of law until the facts are determined. As the court further pointed out in the *Morgan* case (p. 690):

> "• • • the group of underwriters and dealers, • • • together serve the issuer in making the single, entire, unitary transaction possible by shaping up the issue, underwriting the risk and planning and carrying out the distribution. *Purchases and sales, wholesaling and retailing, of commodities and manufactured products provide no parallel* even remotely resembling the complicated and unitary group action necessary to the successful underwriting and distribution of a new and unseasoned security issue" (emphasis added).

The reasons Worthen proposes as to why review by this Court at this preliminary stage is appropriate (Pet.,

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13. *United States v. Topco Associates* (1972) 405 U.S. 596.

pp. 13-14) have just the opposite thrust. Worthen argues that, under the *Topco* case, the antitrust laws give it the right to combine the two competing bank card systems in itself and to precipitate the merger of the two systems nationwide as other banks follow its lead. Worthen argues that the *Topco* case requires this result even though the practical economic effect would be to reduce competition by eliminating intersystem competition between NBI and Master Charge. If NBI is prevented from demonstrating at trial that Worthen's view of the facts is incorrect, significant competition in a new high-impact industry will have been irremediably eliminated by the merger of the two systems.[14] If, however, Worthen establishes at trial

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14. The court below pointed out (Appx. to Pet., pp. A-20—A-21):

> "The admission, for the purposes of ruling on the motion for summary judgment, that the enforcement of the rule would result in an eventual merger * * * would in itself possibly constitute a violation of the antitrust laws * * *."

And in its *amicus* brief the Department of Justice said (pp. 14-15):

> "The nationwide bank credit card system is a new phenomenon in the rapidly changing field of consumer credit, * * *. The nature and extent of economic competition between such systems, as distinguished from competition among individual member banks in connection with the credit card business, has not been fully explored by courts or economists, and is not yet fully understood. Nor was such an exploration undertaken by the parties for the benefit of the district court in this case. Instead, Worthen and BankAmericard simply stipulated, for purposes of a motion for summary judgment, that the systems were in competition (App. 130).
>
> "We submit that the parties assumed an issue which appears to be crucial to the determination of the economic consequences of BankAmericard By-law 2.16. If competition between the systems is of economic significance, whether directly, or indirectly as it affects competition among members of the two systems, then common membership in the competing systems may raise very serious antitrust problems. For it may result in administration of the two systems by dual members so as to dilute or eliminate that competition, i.e., a

that its view of the facts is correct (contrary to what we believe the evidence will show), no long-range harm will have been done by preserving for the public additional intersystem competition during the pendency of this case.

In sum, contrary to the assertion in the petition for a writ, there is no question of antitrust law ripe for review on this record. Worthen assumes that NBI is a group of separate competitors and argues the application of the group boycott cases. But the evidence submitted by NBI is that NBI is a unitary enterprise. The record presents a diametric conflict of fact as to the fundamental issue to be decided. No argument of law can be in point until the facts are settled at trial.

The court below held (Appx. to Pet., pp. A-20—A-21):

> "In this case, because of the abbreviated record consisting primarily of affidavits and admissions, we do not know exactly how NBI competes with MC on a system level or how the individual member banks compete with each other. There is not a sufficient basis in the record to determine how the proposed rule would affect competition between NBI and MC, if indeed, there is direct competition between the two; or how it would affect competition between member banks in the same geographical area; or how it would affect the overall interest cost to the credit card holders and the discount cost to the merchants from which the banks purchase the paper. * * *

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pro tanto merger of the systems. It may also invite member banks to 'push' one system to the competitive detriment of the other.

"On the other hand, if BankAmericard and Master Charge are not in fact engaged in significant direct or indirect competition at the system level, or if the by-law erects barriers to the establishment of new systems, or restrains inter-bank competition, then there appears to be no economic justification for barring members from belonging to more than one system."

"The bank card industry is a relatively new one and, with over eight billion dollars in annual business, a very large and important segment of our economy. Considering the importance of the industry and the lack of definitive information relating to competition therein, it would be a mistake to determine this case of first impression on a per se basis. This is especially true where it may result in the dilution of competition or the elimination of one of the two competitors, where this is not an aggregate of illegal restraints such as price fixing or exclusive territorial allocations and where the initial purpose in forming the joint venture, to produce a national credit card, is obviously not illegal."

In *Kennedy v. Silas Mason Co.* (1948) 334 U.S. 249, this Court had before it a summary judgment with respect to the application during World War II of overtime provisions of the Fair Labor Standards Act to the manufacture of munitions for the War Department. The Court disapproved of the summary disposal of the case, saying (pp. 256-257):

"The case * * * comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

"* * * [S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on

which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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